DOCUMENT RESUME

ED 398 794 HE 029 391

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TITLE Guidelines for Affirmative Action Programs. Promoting Equal Opportunity in Higher Education [and] Authors' Addendum.
INSTITUTION United Educators Insurance Risk Retention Group, Inc., Chevy Chase, MD.
PUB DATE Jun 96
NOTE 27p.
PUB TYPE Guides - Non-Classroom Use (055) -- Viewpoints (Opinion/Position Papers, Essays, etc.) (120)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Access to Education; *Affirmative Action; Change Strategies; *Compliance (Legal); *Court Litigation; Decision Making; *Equal Education; Higher Education; *Legal Responsibility; Racial Discrimination; *Risk Management; Sex Discrimination; Trend Analysis

ABSTRACT

This paper reviews critical court cases regarding affirmative action and offers guidelines to institutions of higher education evaluating and developing their affirmative action programs in the context of continuing changes in this aspect of law. It discusses the following aspects of affirmative action: what affirmative action is and the need for affirmative action plans, the legal foundation for affirmative action, and the recent legal history surrounding this issue. The paper emphasizes that institutions should: (1) ensure that their affirmative action plan has a clear purpose; (2) narrowly tailor the plan to achieve that purpose; (3) periodically audit or assess the plan; and (4) make allowances for special considerations. A checklist for institutions evaluating or developing affirmative action plans is offered. A matrix chart compares six major legislative and executive statutes and authorities concerning race and gender discrimination. Major cases discussed in the paper include: Hopwood v. Texas (1996), Adarand Constructors v. Pena (1995), and Regents of the University of California v. Bakke (1978). The appendix provides summaries of these and other significant affirmative action cases from 1978 to 1996. (CK)

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ED 398 794

United Educators Insurance Risk Retention Group, Inc.

Guidelines for Affirmative Action Programs

Promoting Equal Opportunity in Higher Education

Authors' Addendum

July 1996

On July 1, 1996, after the enclosed article went to press, the United States Supreme Court declined to review the decision rendered by the Court of Appeals for the Fifth Circuit in Hopwood v. Texas. While reported in the popular press as a "ruling against" affirmative action, the Court's action does not reflect any view of the Fifth Circuit's decision or its reasoning. It means only that fewer than four justices voted to review the case. The practical significance of the Supreme Court's action is that the Hopwood decision must be followed in the Fifth Circuit (Texas, Louisiana, and Mississippi). As is customary, the Court did not explain its reasons for deciding not to review Hopwood. However, Justices Ginsburg and Souter, in a one paragraph statement, explained that despite the "great national importance" of the affirmative action issue, they voted against review because the University of Texas Law School had discontinued permanently the admissions program that was reviewed by the trial court, and therefore there was no "case or controversy" to be decided. This appears to signal that these two justices believe that the issues decided in Hopwood are of such national significance that they would be considered by the Court in an appropriate case.

The Supreme Court will probably wait for several additional Courts of Appeal to issue affirmative action decisions before weighing in again. In the interim, the guidelines provided in this article should assist in evaluating your institution's plans. While it is likely that other courts will consider the overall legal issue of whether diversity is a constitutionally protected goal for educational institutions, they may well focus on facts, not merely on the competing arguments of legal principle concerning affirmative action. These facts may include:

1) Whether using a particular "plus factor" plan makes race or gender a decisive factor;

2) Whether, in fact, there is open competition for each and every admission, scholarship, or faculty or administrative position;

3) Whether the dismantling of a particular affirmative action plan will impede an institution's ability to achieve or maintain diversity;

4) Whether the plan is based on stereotypes or irrebuttable presumptions about race or ethnicity.

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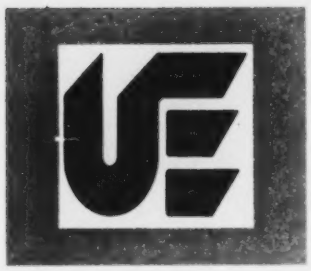

United Educators Insurance Risk Retention Group, Inc.

Guidelines for Affirmative Action Programs

Promoting Equal Opportunity in Higher Education

June 1996

The United States Supreme Court's decision in *Adarand* in June 1995 and the March 1996 Fifth Circuit Court of Appeals decision in *Hopwood* have called into question the legality of education institutions' affirmative action plans. In addition, a number of actions and announcements by state officials have put public colleges and universities in their states on notice that the institutions must abandon race-based affirmative action plans.

On April 30, 1996 the state of Texas filed a petition in the *Hopwood* case requesting that the Supreme Court review the Fifth Circuit decision prohibiting the University of Texas Law School from considering race in its admissions process. On May 24, 1996 the United States filed a similar petition. The Supreme Court has not directly addressed affirmative action issues in the education context since *Bakke* in 1978, and the guidance provided by that case must now be reassessed in light of subsequent decisions from the Supreme Court (in non-education cases) and lower courts.

Whether or not the Supreme Court decides to review *Hopwood*, the legal and political landscape for affirmative action in education is likely to remain unsettled for the foreseeable future. Education institutions must monitor closely this ever-changing landscape and regularly review their affirmative action efforts.

This paper provides a checklist for institutions to use in evaluating their affirmative action programs as the status of the law continues to evolve (page 20). It also reviews the legal history of this important issue and provides a summary of the primary race and gender discrimination statutes and authorities relevant to higher education (page 21). Please note that the information in this paper is not intended to substitute for the advice of legal counsel, nor does it set out requirements for any particular institution or set of circumstances.

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Introduction

Affirmative Action Under Fire

As a result of *Adarand*,[1] *Hopwood*,[2] and other recent court decisions, the legal viability of affirmative action programs is a serious issue for colleges and universities today. One recent lawsuit successfully challenged a scholarship program at the University of Maryland, and another lawsuit was filed in March 1996 by a group of white undergraduate and law students enrolled in various institutions of the University of North Carolina challenging race-based scholarship grants used to diversify the institutions.

Affirmative action programs have also been challenged in the legislative and administrative arena. In December 1995, Colorado's Attorney General advised the state's 28 public universities that they should no longer provide race-specific scholarships or help select students to receive such scholarships funded by outside groups. The Arizona Board of Regents ordered its state's three public universities to determine if affirmative action is still necessary to insure diversity on campus, a directive responding to an aggressive campaign to end programs that use race and ethnicity in decision making.

In California, the Board of Regents decided to stop selecting students, hiring faculty members, and awarding contracts on the basis of race or sex, and issued new guidelines for hiring and admissions. Under these new guidelines, 50 percent of college applicants will be admitted solely on academic achievement, and up to half of the applicants meeting minimum academic requirements will be evaluated on "special circumstances." "Special circumstances" include whether a student has shown unusual persistence and determination, needs to work, is from a socially disadvantaged or educationally disadvantaged environment, or has a difficult family situation. Indeed, since the *Adarand* decision, more than a dozen states have considered bills to prevent their public universities from using racial considerations in admissions or hiring.

The landmark affirmative action decision involving institutions of higher education is *Regents of the University of California v. Bakke*.[3] The U.S. Supreme Court's decision in *Adarand*, however, called into question the principles of *Bakke*, upon which most college and university affirmative action plans are based. In the wake of *Adarand*, the United States Court of Appeals for the Fifth Circuit, in a lawsuit challenging the University of Texas Law School's admissions program, completely rejected the *Bakke* principles. Both the United States and the state of Texas have asked the Supreme Court to review that case (*Hopwood v. Texas*), reaffirm *Bakke's* principles, and clarify the circumstances under which race may be used as one criteria in admissions.

Diversity traditionally has been viewed as an important component of all aspects of the academic environment, including admissions, financial aid, hiring, and even the awarding of contracts. Diversity also has been regarded as a major factor in enriching the quality of education for all students. In addition, access to higher education is recognized as a key factor in social mobility. Several recent court decisions, however, have held that those goals can be achieved without focusing primarily on race. Unfortunately, little guidance has been provided on how to achieve these goals and satisfy the constitutional standard of review. Nevertheless, education institutions must take care to provide equal opportunity in ways consistent with contemporary court decisions.

What should institutions do? Institutions should understand the different kinds of affirmative action plans, the legal basis for those plans, and the significant recent court decisions. Institutions should also review their plans periodically in light of the developing law and issues.

What is an Affirmative Action Plan?

Affirmative Action Plans

Affirmative action plans are programs that seek to give opportunities or other benefits to persons, wholly or in part, on the basis of their membership in a specified group or groups. In the higher education context, such plans have been used for admissions, scholarships, hiring, and the awarding of contracts.

Affirmative action programs need not — and should not — be quota programs. A quota program is a system in which a position or slot (or percentage of positions or slots) is reserved, held open, or set aside for a member of a specified group. Affirmative action plans, on the other hand, may include goals and timetables that are merely guidelines, to be used flexibly and not as a direct requirement to fill a specified number of slots with specified minority groups.

Do You Need an Affirmative Action Plan?

It is important to understand the historical purposes of affirmative action. The primary purpose of affirmative action was to remedy the effects of discrimination. As the U.S. Civil Rights Commission noted in 1977, affirmative action is used "to correct or compensate for past or present discrimination or prevent discrimination from recurring in the future."[4] There are secondary purposes as well. They include the interest in promoting diversity or providing role models for other minorities.

Based on these purposes, affirmative action plans have been broadly categorized as remedial or voluntary. *Remedial plans* are court-ordered plans that result as part of the "damages" awarded in certain kinds of discrimination suits. Designed to remedy past discrimination, these plans are frequently established through consent decrees as a result of a settlement of a lawsuit.

Voluntary plans are all other plans not required by court order. They include those that are permitted or required by federal law, regulation, or executive order. Executive Order No. 11246, for example, requires certain federal contractors to adopt written affirmative action plans that set goals for hiring minorities and women. Specifically, Executive Order No 11246 requires federal contractors that have 50 or more employees and have federal contracts in excess of $50,000 to adopt written affirmative action plans that set annual goals for hiring minorities and women into positions where they are underutilized. Executive Order No. 11246 is administered by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

OFCCP historically has taken the position that court decisions limiting affirmative action do not apply to the agency's program because the program does not *require* preferences and is based on goals rather than quotas. However, because of the court decisions analyzed below, OFCCP's position may be difficult to sustain.

Voluntary plans also include those that are entered into by the institution, not as the result of a court order or agreement or as otherwise required by law, but as a reflection of an institution's affirmative action goals. These types of plans may be remedial or non-remedial in nature. This paper focuses primarily on voluntary affirmative action plans.

The Applicable Law

The Legal Foundation for Affirmative Action

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[5] Distinctions in treatment based on race, color, ethnicity, or national origin are particularly disfavored and are subject to strict scrutiny, meaning they can be legally justified only if they serve a "compelling governmental interest" and are "narrowly tailored" to meet that interest. This is the primary authority under which affirmative action cases arise.

Court decisions addressing affirmative action plans also arise under Titles VI and VII of the Civil Rights Act of 1964.[6] Title VI prohibits institutions that receive federal funds from discriminating on the basis of race, color, or national origin. Specifically, Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.[7]

Whereas the Equal Protection Clause applies only to public institutions, Title VI applies also to private schools. Under both Title VI and the Equal Protection Clause, the courts apply a "strict scrutiny" standard, meaning that under only the most limited circumstances will racial considerations be tolerated. As discussed further in this paper, these circumstances may become more limited in the future.

Title VII is the principal federal employment discrimination statute and has been used to challenge employment-based affirmative action programs. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[8] Title VII applies to private and public institutions.[9]

The standard for both race and gender-based affirmative action programs under Title VII is more lenient than the standard applied under the Equal Protection Clause. Under Title VII, an affirmative action program must be designed to eliminate the "manifest imbalance" in the employment of women or minorities and must not "unnecessarily trammel" the interests of male or non-minority employees. Several court cases brought under Titles VI and VII, as well as a chart that outlines the applicability of these statutes and other authorities, such as Executive Order 11246, are included in the Appendix.

The Historic "Safe Harbor" of Bakke

In 1978, the United States Supreme Court issued its landmark decision in *Regents of the University of California v. Bakke*.[10] In *Bakke*, a white applicant denied admission into the University of California at Davis Medical School challenged the school's admissions program under the Equal Protection Clause and Title VI because it set aside 16

United Educators' Claims Experience

The reverse discrimination claims United Educators has received commonly contain an affirmative action component, either directly or implicitly. Reverse discrimination issues typically arise in claims alleging failure to hire, failure to admit, or failure to promote. Because the schools in these cases have had well-documented admissions and hiring procedures, the claims have generally been defended on the ground of applicant or employee qualifications.

In most reverse discrimination claims handled by UE, prospective or current employees have alleged that their applications were given only cursory consideration and the successful candidate was less qualified for the position, raising the specter of discrimination. Typically, the claimant identifies the affirmative action plan as the culprit.

of the 100 places in each year's class for members of certain minority groups and created separate committees to review the minority and non-minority applicants. The Supreme Court, in a plurality decision, invalidated the program.

Justice Powell, who wrote the controlling opinion for a divided Court, based his opinion on two findings: (1) that the plan was essentially a quota that reserved 16 places for minorities and shut out non-minorities from any opportunity to compete for the 16 slots; and (2) that the plan was not based on remedying the effects of past discrimination.

Justice Powell's opinion did, however, provide a "safe harbor" for educational affirmative action plans. He wrote that increasing the racial and ethnic diversity of the student body constitutes a "compelling interest" because it enriches the academic experience by providing a meaningful diversity of viewpoints and experiences. An admissions program which did not classify solely on the basis of race, unlike the Davis plan, but which considered race or ethnic origin as one factor — a "plus" factor — in the admissions process could be "narrowly tailored" to overcome a constitutional challenge. (A detailed summary of *Bakke* is included in the Appendix.)

After the *Bakke* decision, higher education decision makers could safely follow certain principles in admissions, including (a) a very limited consideration of race through goals and timetables, but only as a means of remedying past discrimination; (b) the promotion of diversity in the academic community as a means of enriching the educational experience; (c) the use of affirmative action plans, narrowly tailored, to meet the compelling interest of promoting diversity; and (d) the use of race/ethnic origin as one of several "plus" factors in admissions decisions. These same principles were also followed in hiring decisions by higher education administrators.

The Appendix summarizes a number of decisions in the 1980s which follow those principles. However, the vitality of these principles has been placed in doubt by the Supreme Court's decision in *Adarand*.

Adarand -- How Have the Rules Changed?

The Supreme Court, by its own admission, "alter[ed] the playing field in some important respects" in *Adarand Constructors v. Pena*, 115 S. Ct. 2097, 2118 (1995). *Adarand* was not a "quota" case, in that the challenged program took race into account only indirectly. The case concerned a non-minority subcontractor that challenged a federal highway program that provided a financial incentive for contractors to

hire "socially and economically disadvantaged" subcontractors. The non-minority subcontractor submitted the low bid for a contract; however, it was not awarded the contract because it was not certified as a disadvantaged business. The subcontractor challenged the program claiming that it violated the Equal Protection component of the Fifth Amendment. The Court held that the program should be subject to the strict scrutiny analysis and remanded the case to the lower court for further review.

The *Adarand* decision is significant for many reasons, the two most important being:

1. It called into question a program that did not involve a rigid quota but merely a presumption that minority contractors were "disadvantaged," thus warranting the financial incentive.

2. It applied strict scrutiny to a plan that did not discriminate on its face. It held that all programs in which race or ethnicity is a basis for decision making are suspect.

The Adarand Court thus ignored the distinction made by Justice Powell in *Bakke* between quotas and programs in which minority status may be a "plus." Moreover, the decision placed in jeopardy the notion articulated in *Bakke* that the achievement of diversity is a compelling governmental interest.[11] The effect of *Adarand* on education institutions is still unclear. Should the Supreme Court issue an opinion on *Hopwood*, the impact of *Adarand* on education would be better defined.

In the wake of *Adarand*, the United States Court of Appeals for the Fifth Circuit completely rejected the *Bakke* principles in *Hopwood v. Texas*.[12] The importance of the Fifth Circuit's *Hopwood* decision and its implications will depend on whether the Supreme Court decides to review the case.

In *Hopwood*, four white applicants who were denied admission to the law school challenged an admissions program in which the law school attempted to achieve targets of 10 percent Mexican-American students and 5 percent African-American students, reflecting the percentages of Mexican-American and African-American college graduates of Texas institutions. To achieve those targets, the admissions committee used separate procedures to review minority files and maintained segregated waiting lists that divided applicants by race. As a result of the program, the effective admission scores for minority students were lower than those of non-minority students.

Reverse Discrimination Claims

The defense of reverse discrimination claims can be costly. In an effort to support their claims, plaintiffs look not only to formal affirmative action plans but also to numerical data.

Due to the broad discovery frequently afforded litigants, plaintiffs have delved into the statistical representation of various groups on a campus and in the relevant workforce. While some of the information is readily available, much is not. The cost to compile such information is compounded by the time required of school personnel in assembling the data and the potential for disruption to the institution. Further, the defense of such claims also requires extensive interviewing of university administrators and departmental officials and can intrude upon the school's daily operations.

The law school justified the program on two grounds. The first, relying on Justice Powell's opinion in *Bakke*, was the school's interest in promoting a diverse student body. The second was to remedy the present effects of past discrimination. The Fifth Circuit rejected the school's assertion that the program was necessary to remedy the past effects of discrimination. The court, therefore, invalidated the admissions program.

Taking issue with Justice Powell's opinion in *Bakke*, the court declared that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest."[13] Rather, the use of race treats minorities as a group rather than as individuals and promotes improper racial stereotypes, thus fueling racial hostility. According to the court, the use of race, in and of itself, simply achieves a student body that looks different.[14]

The court went even further and disavowed Justice Powell's second *Bakke* principle that race or ethnic origin may be used as a "plus" factor in the admissions process. It wrote that the use of racial diversity even as part of the consideration of a number of factors is unconstitutional.[15]

Guidelines for Affirmative Action Programs

Although uncertainties remain, the affirmative action cases discussed in this paper provide some guidance when adopting or reassessing affirmative action plans. To assess their plans and reduce litigation risks, colleges and universities should consider the following issues.

Does Your Affirmative Action Plan Have a Clear Purpose?

The context in which a plan is developed is critical. Is your plan for admissions, financial aid, employment, or contracting? Each program needs its own distinct analysis to determine whether affirmative action is appropriate or required. Within each category for which a plan is being considered, determine whether the purpose of your plan is remedial (i.e., to remedy the effects of past discrimination) or non-remedial (e.g., to promote diversity or provide role models for minorities).

If your affirmative action plan is remedial in nature, you must identify with precision the discrimination to be remedied. Generalized or "amorphous" claims of discrimination, or claims of societal discrimination are insufficient. According to recent Court of Appeals cases, which are not yet binding on all institutions, the school must

demonstrate past discrimination against the groups the plan seeks to benefit.

Once the discrimination is identified, review the number of minorities in the relevant pool and make a record showing that minorities are underrepresented. General population statistics will not suffice.

If your plan is non-remedial in nature, identify its purpose. One open question after *Adarand* is whether non-remedial goals, such as diversity, can justify an affirmative action plan. Although the Supreme Court has not directly addressed this issue, statements in the more recent opinions suggest that the interest in diversity may not be a legitimate basis for an affirmative action plan. Indeed, the Fifth Circuit Court in *Hopwood* held that it was not.[16]

Is Your Plan Narrowly Tailored to Achieve that Purpose?

Once you have identified the purpose of your plan, it is important that your plan be narrowly tailored to achieve that purpose. The purposes of this "narrowly tailoring test" are to ensure that your plan is the product of careful deliberation and is truly necessary, and to ensure that less intrusive means are not available.

When determining how to tailor your plan, seriously examine and document your consideration of race-neutral alternatives before resorting to race-conscious plans. For example, consider a plan that gives preferences to persons who are socioeconomically disadvantaged.

If your plan is remedial in nature, be sure that the beneficiaries are members of the minority groups that were the victims of discrimination. In other words, do not include particular minority groups in a plan if there is no basis to conclude that those groups were the victims of the specific discrimination you are seeking to remedy.

If a plan contains numerical goals, the goals should bear a relationship to the pool of qualified or eligible applicants in the appropriate pool (labor or admissions). As seen in *Hopwood*, though, even numerical goals bearing a relationship to the appropriate pool can be invalidated by the courts.

Adarand does not provide clear guidance on when plans that consider race as a "plus factor" would be considered "narrowly tailored." It is safe to conclude, however, that plans which make decisions solely on the basis of race or which shut out non-minorities

Allegations that Trigger Claims

Allegations that have triggered reverse discrimination claims include:

— Comments by supervisors or others in the hiring process indicating that the position in question was slotted for a minority person, or that the institution wanted to hire a minority or female applicant to increase the presence of such groups on campus.

— An institution's use of a special affirmative action fund from which departments were given incentive bonuses if minority and female candidates were hired.

— A college's practice to hire staff mirroring the community they serve in a program for inner-city youth.

from competing for certain admissions slots or faculty or administrative positions, are not likely to withstand legal scrutiny. Therefore, each admissions, hiring, or promotion decision must be based on individualized considerations and open competition.

Similarly, a plan should be flexible enough or contain waivers so that exceptions can be made where appropriate.

Finally, a plan should be temporary and used only as long as necessary to achieve its purposes.

Do You Periodically Audit or Assess Your Plan?

It is important that you periodically assess your plan and how it is implemented in practice to determine whether there is a continued need for its use.

Review the mission statement or description of the institution's affirmative action plan to ensure that it is not based on stereotypes or irrebuttable presumptions about race, ethnicity, or gender.

Review the design of the plan to be certain that there is open competition for admissions or faculty or administrative positions, and that no slots are effectively assigned to minorities or women.

Audit the implementation of the plan to ensure that the program is carried out as intended. Pay particular attention to the written record supporting the decisions and take a statistical sample of the results to check for any hidden preferences.

Special Considerations

Affirmative action plans necessarily impose some burdens on individuals who do not belong to the groups favored by the plan. However, some actions, such as layoffs, impose greater burdens on the individuals who are not in the favored group than other actions, such as admissions decisions, where the burdens are more diffuse. Be even more cautious with plans or actions that impose these greater burdens.

In the case of minority scholarships, consider relying on private funds. To avoid Title VI concerns, the party that administers the funds must not itself receive federal financial assistance and must administer the funds directly to the students and not through the school.

Consider alternatives to traditional affirmative action plans such as outreach programs for high schools that have a substantial number of disadvantaged students to help the students prepare for college and succeed once they enroll. The University of California at Berkeley, for example, has established the "Berkeley Pledge," a multimillion dollar initiative to put more resources into needy schools in the San Francisco Bay area. The purpose of the program is to help enlarge the pool of minority applicants qualified to enter Berkeley.

Job Fair Lawsuit

In one matter, a *pro se* plaintiff alleged that as a non-minority he was not offered equal employment opportunities because a job fair jointly sponsored by several private schools was designed to promote diversity in their teaching staffs. Admission to the gathering was open to anyone, and the same information, including job application procedures, was available to all attendees.

In defending the lawsuit, the schools maintained 1) that the plaintiff was afforded all the same opportunities as any other person without regard to race, 2) that participation in a job fair is not covered under the employment provisions of Title VII of the Civil Rights Act, and 3) that holding a job fair aimed at diversifying the workplace was not an "affirmative action" issue, but even if it was, such conduct was warranted by the schools' legitimate desire to increase the variety in the schools' teaching populations.

The court agreed that the plaintiff had not been prohibited from attending the job fair. Further, the court found that the plaintiff did not ever apply for a job with any of the schools. Therefore, the plaintiff could not show that he had suffered any harm as a result of the fair. In discussing the affirmative action aspects of the claim, the court found no support for plaintiff's argument that a private educational institution violates the law by encouraging and recruiting qualified minority applicants. Significantly, the court intimated that the ruling would have been a closer call if actual hiring were at issue, but in the context of recruitment, no civil rights violation had occurred. The lower court's decision was affirmed by the United States Court of Appeals for the Fourth Circuit.

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What's Past is Prologue

The U.S. Supreme Court's 1978 decision in *Bakke* suggested: (1) that a school's interest in diversity is a compelling interest that could support an affirmative action program; and (2) programs that considered race or ethnic origin as a "plus" factor could survive a constitutional challenge.

A few of the Court's subsequent decisions, and its most recent decision in *Adarand*, 17 years after *Bakke*, have created great uncertainty.

While *Adarand* provided guidance, many questions remain, including whether non-remedial goals, such as diversity, can justify an affirmative action plan. Justice O'Connor, who wrote the majority opinion in *Adarand*, had earlier supported the view that they could. In subsequent opinions, however, she has moved in the other direction. In one opinion, she wrote that affirmative action must be strictly reserved for the remedial setting,[17] and in a dissenting opinion in another case, she wrote that only one interest has been recognized as compelling — "remedying the effects of racial discrimination."[18] Moreover, the Fifth Circuit in *Hopwood*, invalidating the University of Texas Law School's admissions program, quoted Justice O'Connor and held that "*any* consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest."[19]

Second, *Adarand* clearly rejected one premise of Justice Powell's *Bakke* opinion — that there is a clear-cut distinction between quota plans and plans in which race or ethnic origin is a "plus" factor. However, the Court provided no guidance on determining when the "plus factor" plans would be considered "narrowly tailored." Indeed, the Fifth Circuit Court in *Hopwood*, in a broadly worded opinion, held that the use of race or ethnicity "even as part of the consideration of a number of factors, is unconstitutional."[20] The *Hopwood* decision is not binding in jurisdictions outside the Fifth Circuit (Texas, Mississippi, and Louisiana) though it may provide guidance for others. Though it is too soon to tell whether the *Hopwood* opinion will survive the U.S. Supreme Court's review, the deciding issue in such cases may well be whether the plan effectively shuts out non-minorities from competing for certain admissions slots or faculty or administrative positions. Each admissions, hiring, or promotion decision must be based on open competition. If non-minorities are rendered ineligible for certain positions, the program will not withstand legal scrutiny.

Following *Adarand*, federal district courts are likely to permit wide-ranging discovery to test whether a program that is designed properly is implemented properly. This will require decision makers to make a strong, precise record of the basis for each decision and to

avoid analysis based on stereotypes and presumptions that only minorities can be "disadvantaged." Indeed, in one decision, a federal court rigorously reviewed a statistical "disparity" study prepared by a respected economist and found, as a result, that the study failed to demonstrate a sufficiently compelling interest to justify the plan.[21]

The decisions in *Adarand* and *Hopwood* demonstrate the need for colleges and universities to focus on their affirmative action plans as a source of potential concern. Because this area of the law is still evolving, it will be important to keep abreast of further legal developments and to analyze the implications for your institution.

APPENDIX

SIGNIFICANT AFFIRMATIVE ACTION CASES

Equal Protection Clause and Title VI Cases

Regents of the University of California v. Bakke

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a plurality of the Supreme Court for the first time applied strict scrutiny analysis to an affirmative action program. In *Bakke*, the Court invalidated an admissions plan enacted by the Medical School of the University of California at Davis, which was designed to assure the admission of a specified number of minority group students by reserving slots for members of those groups.

The Medical School admitted 100 new students each year using two separate admissions procedures. Under the regular admissions procedure, which filled 84 of the slots, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. Following personal interviews, each remaining candidate was rated by members of the admissions committee based on interviewers' summaries as well as the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test, letters of recommendation, extracurricular activities, and other biographical data. The ratings were added to arrive at each candidate's "benchmark" score. The full committee then reviewed the file and scores of each applicant and made offers of admission.

The special admissions program, which filled the remaining 16 seats, operated with a committee separate from the admissions committee. If any African-American, Hispanic, Asian, or American Indian wished to be considered under the special program, the application was forwarded to the special admissions committee. The special admissions committee then rated the applications in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to the other applicants. Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants. The special committee continued to recommend special applicants until 16 applicants were admitted. There was no evidence of past discrimination against minorities at the Medical School.

The Supreme Court invalidated the Davis plan. Justice Powell, who wrote the controlling opinion for the divided Court, based his opinion on the finding that the plan was a quota that reserved places for minorities based solely on race and shut out non-minorities from any opportunity to compete for the 16 special slots. However, Justice Powell provided a safe harbor for institutions devising affirmative action plans. He wrote that increasing the racial and ethnic diversity of the student body constitutes a "compelling interest" because it enriches the academic experience by providing a richer diversity of viewpoints and experiences. Moreover, Justice Powell contrasted admissions programs for which race and ethnicity are outcome determinative with programs in which they are but one factor in the admissions decision. He found that the latter types of plans did not mandate quotas, did not insulate minority-group applicants from competition with all other candidates for the available seats, and thus could be "narrowly

tailored" to overcome a constitutional challenge. Indeed, Justice Powell cited with approval the Harvard College Plan wherein race or ethnic background could be considered a "plus" in admissions decisions.

Between *Bakke* and *Adarand*

After *Bakke*, the Supreme Court continued to be divided on affirmative action issues. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court appeared to liberalize affirmative action standards by upholding a 10 percent set-aside program for a federal public works program.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), a plurality of the Court invalidated a School Board's attempt to modify its seniority-based layoff provisions to protect newly hired minority teachers. In a concurring opinion, Justice O'Connor reaffirmed Justice Powell's opinion in *Bakke* that fostering diversity in higher education is a compelling interest.

In *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986), a plurality of the Court upheld a lower-court order establishing minority membership goals based on the percentage of minorities in the relevant labor pool.

In *United States v. Paradise*, 480 U.S. 149 (1987), a plurality of the Court upheld a court-ordered affirmative action plan based on a judicial finding of past discrimination that required at least 50 percent of Alabama state trooper promotions to go to African-American officers until each of its upper ranks was 25 percent African-American, or until the department implemented an acceptable promotion plan.

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a majority of the Court adopted the strict scrutiny test for a local affirmative action program, consistent with Justice Powell's opinion in *Bakke*.

In *Croson*, the purpose of the set-aside program was to overcome the effects of past discrimination in the construction industry in Richmond. Although there was no evidence that the City itself had discriminated, there was evidence before the City Council that only .67 percent of the city's prime construction contracts had been awarded to minority businesses within the past five years even though the population of Richmond was 50 percent black. There was also evidence that most of the contractors' associations active in the area had virtually no minority businesses within their membership. Finally, there was evidence in Congressional reports that there had been extensive discrimination against minorities in the construction industry nationwide.

Nevertheless, the Supreme Court struck down the Richmond plan. Although the purpose of the plan was to remedy past discrimination in the construction industry, the Court found that the "30 percent quota" could not be tied to any specific injury. The Court found that the record did not support a conclusion that qualified minority contractors in Richmond had been discriminated against because there was no evidence documenting the number of qualified minority contractors in the Richmond market. The Court also held that the program was not narrowly tailored to meet its remedial objective. There was no showing that the City considered race-neutral means to increase minority participation. The 30 percent quota, according to the Court, was not narrowly tailored to any goal except "outright racial balancing" since it was based on the "assumption that minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507.

In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Supreme Court upheld FCC policies that permitted the FCC to consider minority ownership as one positive factor among several when it awarded new radio or TV licenses. The Court found that the interest in diversity was an important governmental objective. Citing *Bakke*, the Court explained, "Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, . . . the diversity of views and information on the airwaves serves important First Amendment values." 497 U.S. at 568 (citations omitted).

After *Metro Broadcasting*, the *Bakke* principles appeared to be alive and well. Justice Powell's opinion in *Bakke* was cited with approval in *Metro Broadcasting* and by Justice O'Connor in *Wygant*. Moreover, the Court had not invalidated plans which granted a "plus" based on minority status, focusing instead on quota and set-aside programs. However, Justice O'Connor's opinion in *Croson* raised the issue of whether affirmative action plans could be sustained on non-remedial grounds.

Adarand

In *Adarand Constructors v. Pena*, 115 S. Ct. 2097, 2118 (1995), a non-minority subcontractor challenged a federal highway program which provided a financial incentive for contractors to hire "socially and economically disadvantaged" subcontractors. The non-minority subcontractor submitted the low bid for a contract; however, it was not awarded the contract because it was not certified as a disadvantaged business. The subcontractor challenged the program claiming that it violated the Equal Protection component of the Fifth Amendment.

The Court reviewed its earlier opinions to determine the level of scrutiny to be applied to remedial use of racial classifications in federal programs. Based on its review, it gleaned three principles: skepticism, requiring "a searching examination" of any classification based on race or ethnicity; consistency, noting that the standard of review under the Equal Protection Clause is not dependent on those burdened or benefited by a particular classification; and consistency, opining that the equal protection analysis of federal government action must be the same as the analysis of state and local action. It then held that the federal program was subject to the strict scrutiny analysis and remanded the case for further review.

The *Adarand* decision is significant in that it questioned a program that did not involve a rigid quota but merely a presumption that minority contractors were "disadvantaged," thus warranting the financial incentive. Thus it ignored the distinction made by Justice Powell in *Bakke* between quotas and programs in which minority status may be a "plus." Second, it applied strict scrutiny to a plan that did not discriminate on its face and held that all programs in which race or ethnicity is a basis for decision making are suspect. Finally, the decision placed in jeopardy the notion articulated in *Bakke* that the achievement of diversity is a compelling governmental interest.

Recent Higher Education Cases

In *Davis v. Halpern*, 768 F. Supp. 968 (E.D.N.Y. 1991) a federal court permitted an unsuccessful non-minority applicant to challenge the City University of New York Law School's admissions program. The court held that the school proffered no evidence that the school engaged in any prior discrimination harmful to the minorities favored by the program. The court held as well that the school's purposes in adopting the plan — to remedy underrepresentation in the legal profession, to reflect local diversity, and to counter societal discrimination — were not permitted under the Constitution.

In *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995), a federal court of appeals invalidated a University of Maryland merit-based scholarship program that was open only to African-American students. The University maintained a separate merit-based scholarship program that was not restricted to African-American students. Podberesky, a Hispanic student, was ineligible for consideration under the second program because his academic credentials fell just shy of its more rigorous standards. He met all of the requirements of the first program except race, however, and challenged the program.

The University argued that the program was necessary to remedy the present effects of past discrimination. The present effects were that: (1) the University had a poor reputation within the African-American community, (2) African-Americans were underrepresented in the student population, (3) African-American students who enrolled at the University had low retention and graduation rates, and (4) the atmosphere on campus was perceived as being hostile to African-American students. The court, however, rejected each of the justifications.

As to the University's poor reputation, the court acknowledged that many citizens knew of the University's past segregation. The court explained, however, that "mere knowledge of historical fact" was not the kind of present effect that could justify a race-exclusive remedy. As to the hostile climate, the court recognized that racial tensions exist at colleges and universities. Nonetheless, it found that the hostile climate was not the result of past segregation but the result of societal discrimination which could not be used as a basis for supporting a race-conscious remedy. Finally, the court found that the University's evidence was insufficient to demonstrate that African-Americans were underrepresented in the student population or that African-American students who enrolled at the University had low retention and graduation rates. Even if the University's evidence was sufficient, the court held that the scholarship program was not narrowly tailored to remedy these effects since the program attracted high achieving black students and was open to non-Maryland residents who were not the types of students that were subjected to the University's past discrimination.

In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3765 (U.S. April 30, 1996) (No. 95-1773) the U.S. Court of Appeals for the Fifth Circuit held that the admissions policies of the University of Texas Law School violated the Equal Protection clause.

In the admissions plan, the law school attempted to achieve targets of 10 percent Mexican-American students and 5 percent African-American students, which reflected the percentages of Mexican-American and African-American college graduates of Texas institutions. To achieve those targets, the presumptive admissions score for minority students was lower than that of non-minority students. In addition, the admissions committee used different procedures for the review of minority and non-minority files and maintained segregated waiting lists that divided applicants by race. White applicants who were denied admission to the law school challenged the admissions process.

The law school justified the program on two grounds: (1) to promote a diverse student body, and (2) to remedy the present effects of past discrimination. The court, in a broadly worded opinion, rejected both of these grounds and invalidated the program.

The court, taking issue with Justice Powell's "lonely opinion in *Bakke*," declared that "any

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consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest." 78 F.3d at 944. Rather, the use of race treats minorities as a group, rather than as individuals, and promotes improper stereotypes fueling racial hostility. According to the court, the use of race in and of itself "simply achieves a student body that looks different" and is no more rational than choices based on physical size or blood type of applicants. *Id.* at 945.

The court then disavowed Justice Powell's second *Bakke* principle that race or ethnic origin may be used as a "plus" factor in the admissions process. It held that the use of racial diversity even as part of the consideration of a number of factors is unconstitutional. *Id.* at 945-946.

According to the court, while a university may properly favor one applicant over another because of his ability to play cello, make a downfield pass, or understand chaos theory, the use of race, even as one factor in the admissions process, serves to stereotype and stigmatize individuals and undercuts the ultimate goal of ending racially motivated state action. Thus, according to the court, the use of race to achieve a diverse student body, even as a proxy for permissible characteristics, is not legal. *Id.* at 946.

The court also found that the law school failed to show a compelling interest in remedying the present effects of past discrimination. The law school argued that to determine whether there are present effects of past discrimination, the court should review the well documented history of discrimination in Texas primary and secondary schools as well as in Texas colleges, universities, and professional schools. The court disagreed. It held that it must identify the law school as the relevant alleged past discriminator, not the state as a whole. *Id.* at 948-952.

The court then rejected each of the law school's bases to justify the affirmative action program. First, citing *Podberesky*, it held that the law school's lingering reputation in the minority community as a "white" school was mere knowledge of historical fact which simply could not justify current racial classifications. *Id.* at 952-953. Second, it held that the perception that the law school was a hostile environment for minorities, as in *Podberesky*, is not a present effect of past discrimination, but the result of present societal discrimination which is contributed to by the "overt and prevalent" consideration of race in admissions. *Id.* at 953. The court concluded that the law school had failed to show a compelling interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system. *Id.* at 955.

Title VII Cases

Two Supreme Court decisions illustrate Title VII.

1. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court upheld a challenge to a private voluntary affirmative action plan between an employer and labor union that reserved 50 percent of the openings in a training program for black workers until the percentage of black workers was the same as their representation in the local labor force. The Court held that the program did not discriminate against white employees.

2. In *Johnson v. Santa Clara County Transportation Agency*, 480 U.S. 616 (1987), the Court upheld a voluntary public affirmative action program that permitted a local agency to consider the sex of applicants as one factor when considering promotions to positions within traditionally segregated job classifications in which women had been

underrepresented. The program had been challenged by a male employee who had been passed over for promotion in favor of a female employee.

In both cases, the Supreme Court concluded that the programs served the purpose of eliminating the conspicuous racial or gender imbalance in traditionally segregated job categories. The plans also did not "unnecessarily trammel" the rights of white or male employees. In *Weber*, the plan did not require that white workers be terminated and replaced with black workers or create an absolute bar to the advancement of white employees. The plan was also a temporary measure.

In *Johnson*, the plan resembled the Harvard Plan in *Bakke*. Like race in the Harvard Plan, the sex of the applicants in *Johnson* was but one of numerous factors considered in deciding which employee to promote. In addition, there was no legitimate, firmly rooted expectation in being promoted. The male employee passed over for promotion retained his employment, at the same salary and with the same seniority, and remained eligible for other promotions. Finally, the plan was implemented to attain, as opposed to maintain, a balanced work force.

In a recent education case applying Title VII, *U.S. v. Board of Education of Piscataway*, 832 F. Supp. 836 (D.N.J. 1993) (appeal pending), a federal court struck down a school board's affirmative action plan that preferred minority teachers over non-minority teachers in layoff decisions. The court found that there was no showing that the plan was adopted to remedy past discrimination or as a result of a manifest imbalance in the employment of minorities. Indeed, statistical analyses demonstrated that the percentage of minority teachers employed by the board had consistently exceeded the percentage of qualified minorities in the workforce. In addition, the court rejected the notion that faculty diversity "for education's sake" was a permissible purpose under Title VII. Finally, the court found that the layoff program, unlike a promotion or hiring program, "unnecessarily trammeled" on the rights of non-minorities.

CHECKLIST FOR AFFIRMATIVE ACTION PLANS

(This checklist applies to other protected groups as well as race.)

1. Determine whether your plan is remedial or non-remedial.
   - If your plan is remedial, identify with precision the discrimination to be remedied, review the number of minorities in the relevant pool, and make a record showing that minorities are underrepresented.
   - If your plan is non-remedial, identify its purpose.

2. Consider race-neutral alternatives before resorting to race-conscious plans.

3. Ensure that the beneficiaries of a remedial-based affirmative action plan are members of the minority groups that were the victims of discrimination.

4. If a plan contains numerical goals, the goals should bear a relationship to the pool of *qualified* or *eligible* minority applicants.

5. A plan should be flexible enough or contain waivers so that exceptions can be made where appropriate.

6. A plan should be temporary and used only as long as necessary to achieve its purposes. Periodically assess your plan and how it is implemented in practice to determine whether there is a continued need for its use.

7. Review the mission statement or description of the institution's affirmative action plan to ensure that it is not based on stereotypes or irrebuttable presumptions about race or ethnicity.

8. Review the design of the plan to be certain that there is open competition for admissions, faculty or administrative positions, and that no slots are effectively assigned to minorities.

9. Audit the implementation of the plan to ensure that the program is carried out as intended. Pay particular attention to the written record supporting the decisions and take a statistical sample of the results to check for any hidden preferences.

10. Affirmative action plans necessarily impose some burdens on individuals who do not belong to the groups favored by the plan. However, some plans, such as layoff plans, impose greater burdens on the individuals who are not in the favored group than other plans, such as admissions plans, where the burdens are more diffuse. Be even more cautious with plans that impose these greater burdens.

11. In the case of minority scholarships, consider relying on private funds. To avoid Title VI concerns, the party that administers the funds must not itself receive federal financial assistance and must administer the funds directly to the students and not through the school.

12. Consider alternatives to traditional affirmative action plans such as outreach programs for high schools that have a substantial number of minority students to help the students prepare for college and succeed once they enroll.

SELECTED RACE AND GENDER DISCRIMINATION STATUTES AND AUTHORITIES RELATING TO COLLEGES AND UNIVERSITIES

	Public Institutions	Private Institutions	Race	Gender	Employment	Admissions	Scholarships
Equal Protection Clause	X	No	X	X	X	X	X
Title VI, 42 U.S.C. § 2000d, et seq.	Public institutions that receive federal financial assistance	Private institutions that receive federal financial assistance	X	No	Yes, when "primary objective" of federal aid is to provide employment	X	X
Title VII, 42 U.S.C. § 2000e, et seq.	X	X	X	X	X	No	No
Title IX, 20 U.S.C. § 1681, et seq.	Public institutions that receive federal financial assistance	Private institutions that receive federal financial assistance	No	X	Maybe (some disagreement among circuits)	Yes, except private undergraduate, same sex public undergraduate, religious schools	No, except athletic scholarships, and other narrow exceptions
Section 1981, 42 U.S.C. § 1981	X	X	X	No	X	X	No
Executive Order 11246	Public institutions with federal contracts or subcontracts	Private institutions with federal contracts or subcontracts	X	X	X	No	No

ENDNOTES

[1] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

[2] Hopwood v. Texas, 78 F.3d 932 (5th Cir.1996), petition for cert. filed, 64 U.S.L.W. 3765 (U.S. April 30, 1996) (No. 95-1773). The U.S. Court of Appeals for the Fifth Circuit has jurisdiction over Texas, Mississippi and Louisiana.

[3] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[4] William L. Taylor & Susan M. Liss, Affirmative Action in the 1990s: Staying the Course, Annals Am. Acad. Pol. & Soc. Sci., Sept. 1992, at 31 n.1.

[5] U.S. Const., amend. XIV, § 1.

[6] 42 U.S.C. §§ 2000d and 2000e, et seq.

[7] 42 U.S.C. § 2000d. The U.S. Department of Education has adopted regulations under Title VI that require institutions, in certain circumstances, to take affirmative action to remedy discrimination on the basis of race, color, or national origin. Specifically, the regulations require institutions that have previously discriminated against persons in the administration of a program to take affirmative action to overcome the effects of the prior discrimination. 34 C.F.R. § 100.3(b)(6)(i). Even in the absence of prior discrimination, an institution in administering a program may take affirmative action to overcome the effects of conditions which have resulted in limited participation by persons of a particular race, color, or national origin. 34 C.F.R. § 100.3(b)(6)(ii).

[8] 42 U.S.C. § 2000e-2(a)(i). The U.S. Equal Opportunity Employment Commission ("the Commission") has established guidelines under Title VII to protect employers that institute voluntary affirmative action plans from reverse discrimination suits. 29 C.F.R. § 1608, et seq. These guidelines describe the circumstances under which voluntary affirmative action plans are appropriate and the elements that the plans must contain. If an employer has a reasonable basis to conclude that discrimination has occurred, the guidelines permit the employer to adopt goals and timetables to eliminate the discrimination.

If the Commission determines that an institution has adopted and implemented an affirmative action plan in good faith, in conformity with, and in reliance on the guidelines, and the plan is in writing, the institution may use the plan as a defense against a charge of discrimination. However, the defense is not available for the purpose of determining the adequacy of the plan to eliminate discrimination.

[9] Another statutory basis for attacking race discrimination is 42 U.S.C. § 1981. Section 1981 is a post-Civil War statute that guarantees all persons the same right to make and enforce contracts "as is enjoyed by white persons." 42 U.S.C. § 1981. Section 1981 prohibits discrimination against whites as well as African-Americans, and applies to public and private institutions.

Section 1981 has been applied in admissions and employment cases. In one leading case, Runyon v. McCrary, 427 U.S. 160 (1976), the Supreme Court held that Section 1981 prohibited two private, white elementary schools from discriminating against African-Americans in their admissions policies.

[10] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[11] Adarand did not address the appropriate constitutional standard for reviewing affirmative action programs based on gender. In fact, the Supreme Court has never addressed the issue. However, nearly all circuit courts which have addressed gender-based affirmative action programs have applied an intermediate level of scrutiny.

Under "intermediate scrutiny," a gender-based program is justified if it serves an important governmental interest and is substantially related to achieving that interest. Even with this relaxed standard of review, a gender-based classification will be found unconstitutional if there is inadequate evidence that the gender which benefits from the classification has been subjected to past discrimination.

[12] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), petition for cert. filed, 64 U.S.L.W. 3765 (U.S. April 30, 1996) (No. 95-1773).

[13] 78 F.3d at 944.

[14] 78 F.3d at 945.

[15] 78 F.3d at 945-946.

[16] Hopwood v. Texas, 78 F.3d at 948.

[17] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[18] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting).

[19] Hopwood v. Texas, 78 F.3d. at 944 (emphasis added).

[20] Hopwood v. Texas, 78 F.3d. at 945-946.

[21] Contractors Ass'n v. City of Philadelphia, 893 F. Supp. 419 (E.D. Pa. 1995).

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